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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-498

ROBERT OLFF, a minor, by and through his guardian Ad Litem, Mrs. Sonny Olff,

Petitioner,

vs.

EAST SIDE UNION HIGH SCHOOL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM M. SIEGEL,
County Counsel,
County of Santa Clara,

PAUL J. MASON,
Deputy County Counsel,

County Administration Building,
Room 507, 70 W. Hedding Street,
San Jose, California 95110,
Telephone: (408) 299-2111,

Attorneys for Respondents.

SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

May the governing board of a public school district enact regulations controlling the length of hair of male students for the purpose of maintaining an environment conducive to learning and of protecting the health and safety of students?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the regulation enacted by the East Side Union High School District and the constiutional provisions set out in the petition, the following California Statutes are involved:

California Education Code, Section 925.

> "The governing board of each school district shall prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government."

California Education Code, Section 10609.

> "All pupils shall comply with the regulations, pursue the required course of study, and submit to the authority of the teachers of the schools."

STATEMENT OF THE CASE

In addition to the material presented in petitioner's Statement of the Case, the following facts are significant:

1. This action was filed in the District Court on September 22, 1969, at which time the school district was directed to show cause why a preliminary injunction should not issue. [C.T. 14-15]. At the hearing, which was held on September 24, 1969, the school district introduced into evidence numerous affidavits of teach-

ers and administrators in support of the regulation. [C.T. 16-64]. The student, whose hair length was at issue, testified in person. No other witnesses testified at this hearing on the order to show cause.

2. The hair length regulation was adopted by the governing board of the school district, an elected body, pursuant to state law (California Education Code, Section 925), and said regulation applies to all schools within the district.

3. The hair length regulation was reviewed by a committee composed of students, teachers, administrators, and parents from the district. Appendix "A" of Petition, pp. iv-v.

4. The Court of Appeals, in deciding the instant case, concluded:

a. That the hair style of the student was not a badge or symbol of any group, and, consequently, that *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), was inapplicable to the present case. Appendix "A" to Petition, pp. ix-x.

b. The statements in the affidavits from school teachers and administrators were sufficiant to justify the regulation. Appendix "A" to Petition, p. xv.

c. That the absence of a distraction in the school does not establish the fact that boys wearing long hair would not be a distracting influence on the educational process. Appendix "A" to Petition, p. xvi.

d. That the hair length regulation does not infringe on a substantial constitutional right. Appendix "A" to Petition, pp. xvi-xvii.

ARGUMENT

I

A WRIT OF CERTIORARI SHOULD NOT BE ISSUED AS THERE IS NO FINAL JUDGMENT

The only evidentiary hearing in the instant case took place on September 24, 1969, two days after the granting of the order to show cause. (Appendix "A" to Petition, p. vi). The order of the District Court granting a preliminary injunction in favor of the student (Appendix "B" to Petition, p. xxii) was appealed by the school district to the Court of Appeals for the Ninth Circuit. The decision of the Court of Appeals setting aside the order reads as follows:

> "The order granting a preliminary injunction in No. 25,132, *Olff v. East Side Union High School District*, is set aside and the case remanded for further proceedings in accordance with this opinion."

There are numerous instances where this court has refused to take jurisdiction of cases where there is no final judgment.

Brotherhood of L.F.E. v. Bangor & A.R.C., 389 U.S. 327 (1967).

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 257-258 (1915).

Amer. Const. Co. v. Jacksonville Ry., 148 U.S. 372, 384 (1892).

This court has also postponed a determination of its jurisdiction in a particular case until the merits of the case were considered.

Municipal Investors Assoc. v. Birmingham, 316 U.S. 154 (1941).

The decision in the Court of Appeals cannot be considered to be final as was the situation in *Chicago v. Atchison, Topeka & Santa F. Ry.*, 357 U.S. 77 (1958), as there the District Court had only to formally enter the judgment. In the instant case, a trial on the merits has never been held. If such a trial is held, the relief requested by petitioner may become unnecessary. Although this court has issued writs of certiorari in instances where a decision was not final but a conflict existed in the decisions of the Courts of Appeals (*Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-409 [1915]; *Forsythe v. Hammond*, 166 U.S. 506 [1896]), the conflict present here is, at most, only in principle. Factual differences distinguish the cases. (See below)

II

FACTUAL DISTINCTIONS RESOLVE THE APPARENT CONFLICT OF DECISIONS CONCERNED WITH HAIR LENGTH

U. S. Courts of Appeals for the First, Fifth, Sixth, Seventh, and now the Ninth Circuits have considered regulations adopted by public school districts controlling hair length for male students.

Richards v. Thurston, 424 F. 2d 1281 (1 Cir. 1970), cert. denied 400 U.S. 850 (1970).

Ferrell v. Dallas Independent School District, 392 F. 2d 697 (5 Cir. 1968), cert. denied 393 U.S. 856 (1968).

Jackson v. Dorrier, 424 F. 2d 213 (6 Cir. 1970), cert. denied 400 U.S. 850 (1970).

Breen v. Kahl, 419 F. 2d 1034 (7 Cir. 1969), cert. denied 398 U.S. 937 (1970).

Olff v. East Side Union High School District, 9 Cir. 1971, Appendix "A" to Petition.

The decisions in *Ferrell*, *Jackson*, and below in *Olff* have sustained the right of a school district to enact reasonable regulations controlling hair styles. The Courts of Appeals in *Richards* and *Breen* invalidated the regulations. To truly understand the cases, the facts in each case must be examined.

In *Richards*, the Court of Appeals for the First Circuit held that choice of hair length is a liberty protected by the Fourteenth Amendment and that said

sphere of liberty is subject to reasonable intrusions (424 F. 2d 1281, 1284). However, this case was presented to the District Court on extremely sparse facts, each party contending that the other had a burden of proof which it had not met. Consequently, no facts were presented to the lower court by the school district justifying the regulation governing hair length (424 F. 2d 1281, 1282). Without having the benefit of testimony from professional educators, the court held in favor of the student, noting that justification for the regulation was not self-evident and that no evidence of justification was presented (424 F. 2d 1281, 1286).

In *Breen*, the Court of Appeals for the Seventh Circuit determined on the basis of *Griswold v. Connecticut*, 381 U.S. 479 (1965), that a student's choice of hair length and style is a constitutionally protected fundamental right and is subject to limitation only upon a showing of substantial justification. The trial court held that there had been no showing of any possible justification for the school regulation. The appellate court adopted this viewpoint. (419 F. 2d 1034, 1036-37). Furthermore, the majority court in *Breen* distinguished its decision from the one in *Ferrell v. Dallas Independent School District*, 392 F. 2d 697 (5 Cir. 1968), cert. denied 393 U.S. 856 (1968), on the basis that the school district in the *Ferrell* case was able to satisfy the Court of Appeals that the regulation was justified. (419 F. 2d 1034, 1037).

In *Ferrell*, *Jackson*, and *Olff*, the present case, the Courts of Appeals for the Fifth, Sixth and Ninth Circuits concluded that adequate justification for the regulation had been shown, the one element that had been found lacking by the Courts of Appeals for the First and Seventh Circuits in *Richards* and *Breen*.

III

THE RULE PRONOUNCED BY THE COURT BELOW IS REASONABLE AND SOUND

A. Choice of hair length is not a First Amendment right.

Until a student can establish that his hair length constitutes symbolic speech, he is not entitled to First Amendment protection. See, *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969). Merely claiming that his hair style is a symbol is not sufficient. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The Court of Appeals concluded in the instant case that the student did not purport to say anything. (Appendix "A" of Petition, p. x). Consequently, under the facts of the case, a First Amendment right could not be reasonably asserted.

B. Choice of hair length is not a freedom protected by the Fourteenth Amendment.

In *Breen*, the majority Judges placed great weight on *Griswold v. Connecticut*, 381 U.S. 479 (1965), but such emphasis is unwarranted as said case relates to privacy in the home. The lack of logic in expanding the *Griswold* decision to hair length cases was specifically recognized in *Richards v. Thurston*, 424 F. 2d 1281, 1283 (1970), and by the Court of Appeals for the Ninth Circuit in the present case (Appendix "A" to Petition, pp. xi-xii).

CONCLUSION

We think that students in a public school are entitled to an environment conducive to learning. Such an environment does not develop by itself, but is developed in California through regulations adopted by the governing board of a school district, an elected body. Such regulations must be in furtherance of perfecting the educational process and must not unreasonably interfere with the exercise of constitutional rights.

A typical regulation controls the length of hair on male students. Such a regulation is adopted, as here, on the belief that hair beyond a certain length disrupts the educational process and constitutes a health and safety problem.

We respectfully submit that courts should not become involved in the daily operation of school systems or become co-administrators of school districts, as they have neither the time nor the expertise. *Epperson v. Arkansas*, 393 U.S. 97 (1968). This is not to say, certainly, that the courts should not intervene where an infringement of a fundamental constitutional right exists.

We do not think that choice of hair length is a fundamental right, especially where no specific meaning can be given to a particular length of hair. It is completely incomprehensible to elevate every human whim or fancy to the stature of a constitutional right. Surely, the interest of the school district in providing an en-

vironment conducive to learning and in protecting the health and safety of the students outweighs the desire of a male student to wear his hair in any manner he sees fit.

DATED: November 5, 1971.

Respectfully submitted,

WILLIAM M. SIEGEL,
County Counsel,
County of Santa Clara,

PAUL J. MASON,
Deputy County Counsel,

Attorneys for Respondents.